

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 21, 2009

**JIMMY RICHARDSON v.  
TENNESSEE BOARD OF PROBATION AND PAROLE**

**Appeal from the Chancery Court for Davidson County  
No. 08-968-IV     Russell Perkins, Chancellor**

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**No. M2008-02568-COA-R3-CV - Filed September 23, 2009**

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Jimmy Richardson (“Petitioner”) has been in prison for over thirty-three years and currently is confined at the Turney Center Industrial Complex in Only, Tennessee. After being denied parole for the fourth time and his administrative appeal from that decision also being denied, Petitioner filed a petition for writ of certiorari. Petitioner claimed, inter alia, that the decision to deny him parole was arbitrary and capricious and in violation of his due process rights. Because the petition was not properly verified as required by the applicable statutes, the defendant Tennessee Board of Probation and Parole (the “Board”) filed a motion to dismiss. Petitioner thereafter filed a motion to amend the petition to include the required verification. However, the motion to amend was filed more than sixty days after the denial of his administrative appeal. The Trial Court dismissed the petition after finding that Petitioner did not file a properly verified petition within sixty days and, therefore, the Trial Court lacked subject matter jurisdiction over the petition. Petitioner appeals, and we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. McCLARTY, J., joined.

Jimmy Richardson, pro se Appellant.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Kellena Baker, Assistant Attorney General, Nashville, Tennessee, for the Appellee, Tennessee Board of Probation and Parole.

## OPINION

### Background

Petitioner was convicted in June 1976 of numerous criminal offenses, including rape and armed robbery with a deadly weapon. Petitioner received a sentence of 99 years for the rape conviction, and life for the armed robbery conviction. Petitioner had three parole hearings over several years with the first being in 1999. Petitioner was denied parole each time. Petitioner's fourth and most recent parole hearing, the subject of this appeal, was on December 6, 2007. Following that hearing, parole was denied due to the seriousness of the underlying offenses. Petitioner was informed that his next parole hearing would be in two years.

Petitioner timely filed an administrative appeal from the decision to deny him parole. The administrative appeal was unsuccessful, and on April 3, 2008, Petitioner was sent a letter informing him that his appeal was denied. Petitioner received the letter on April 7, 2008. Petitioner was informed in the letter that there was "no further appeal recourse available to you on this matter through the Tennessee Board of Probation and Parole."

On April 29, 2008, Petitioner filed a petition for common law writ of certiorari in the Chancery Court for Davidson County. Among other things, Petitioner claimed that the decision to deny him parole was arbitrary and capricious and that he was denied due process.

On June 2, 2008, the Board filed a motion to dismiss the petition claiming, among other things, that the Trial Court lacked subject matter jurisdiction over the petition because it was unverified. According to the Board, "[w]hile the petitioner submitted a signed, notarized petition, the petition does not contain the verification language specifically required by Article 6, Section 10 of the Tennessee Constitution and Tenn. Code Ann. § 27-8-104." In addition, the Board asserted that Petitioner failed to file an affidavit that complied with the requirements of Tenn. Code Ann. § 41-21-805.<sup>1</sup> More specifically, the Board acknowledged that while Petitioner did file an affidavit,

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<sup>1</sup> In relevant part, Tenn. Code Ann. § 41-21-805 (2006) provides as follows:

**Affidavit of inability to pay – Requirements.** – (a) Any inmate who files a claim with an affidavit of inability to pay costs shall file a separate affidavit with the following information:

(1) A complete list of every lawsuit or claim previously filed by the inmate, without regard to whether the inmate was incarcerated at the time any claim or action was filed; and

(2) For each claim or action listed in subsection (a):

(A) The operative facts for which relief was sought;

(continued...)

he failed to identify any previous lawsuits that he had filed. The Board then identified two previous lawsuits filed by Petitioner.<sup>2</sup>

On June 23, 2008, Petitioner responded to the Board's motion to dismiss and also filed a motion to amend the petition. In response to the Board's claim that the petition was not properly verified, Petitioner stated:

Petitioner files herewith the now completed and accurate version of the affidavit as required pursuant to Tenn. Code Ann. § 41-21-801, et seq. In regards to the notarized petition in review of Article 6 Section 10 of the Tennessee Constitution, and pursuant to respondents (sic) Memorandum of Law, relevant to verification and oath, petitioner asserts that he has sworn to by his statement as is notarized by a notary public, that this was his first application of the writ. This application has been sworn to in front of a notary, and that the petition has been sworn to.

Petitioner now asserts, even though the petition was sworn to in front of a notary public, he respectfully moves to amend the petition pursuant to Tenn. R. Civ. P. 15.01 so as to include the words or sworn oath as follows: I, Jimmy Richardson, hereby swear under the penalty of perjury that the contents of the writ of certiorari are true, correct and accurate to the best of my knowledge and belief.

Along with the motion to amend and response to the motion to dismiss, Petitioner also filed on the same day a document titled "Amended and Sworn to Verified Petition for Common Law Writ of Certiorari." This document contains a section titled "Verification of Complaint" which was signed before a notary public. The "Verification of Complaint" provides as follows:

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<sup>1</sup> (...continued)

(B) The case name, case number and court in which the suit or claim was filed;

(C) The legal theory on which the relief sought was based;

(D) The identification of each party named in the action; and

(E) The final result of the action, including dismissal as frivolous or malicious under this part or otherwise. . . .

<sup>2</sup> The previous lawsuits identified by the Board are *Richardson v. Dep't of Correction*, 33 S.W.3d 818 (Tenn. Ct. App. 2000) (claiming entitlement to sentence credits) and *Richardson v. State*, 1987 WL 18465 (Tenn. Crim. App. Oct. 16, 1987)(petition for post-conviction relief).

## VERIFICATION OF COMPLAINT

Petitioner submits, pursuant to Tennessee Code Annotated § 27-8-106, and § 27-8-104, this is his first application for the writ in this action. And does hereby swear under the penalties of perjury that the contents of the Writ of Certiorari are true, correct and accurate to the best of my knowledge and belief.

Finally, Petitioner also filed a new affidavit pursuant to Tenn. Code Ann. § 41-21-805. This time, Petitioner's affidavit listed the previous lawsuits that he had filed.

In October 2008, the Trial Court issued a Memorandum and Order granting the Board's motion to dismiss. After discussing the procedural background of the case, the Trial Court stated as follows:

A prisoner does not have a right to be released on parole prior to the expiration of his or her sentence. *See Robinson v. Traughber*, 13 S.W.3d 361, 364 (Tenn. Ct. App. 1999). Rather, parole is a privilege, and the power to release a prisoner rests with the Tennessee Board of Probation and Parole. *See* Tenn. Code Ann. §§ 40-28-117(a); 40-35-503(b); *Hopkins v. Tennessee Bd. of Paroles & Prob.*, 60 S.W.3d 79, 82 (Tenn. Ct. App. 2001). In determining parole, the Board is considered to be exercising a judicial function, which is not reviewable if done in accordance with the law. *See* Tenn. Code Ann. § 40-28-115(c). Because parole decisions are discretionary, the only means of obtaining judicial review of these decisions is by a common law writ of certiorari, *see Thandiwe v. Traughber*, 909 S.W.2d 802, 803 (Tenn. Ct. App. 1994), and the review is limited to whether the Board acted illegally, fraudulently, arbitrarily or in excess of its jurisdiction. *See Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). "It is not the correctness of the decision that is subject to judicial review, but the manner in which the decision is reached." *Id.*

\* \* \*

Seriousness of the offense is a proper reason to deny parole, *see* Tenn. Code Ann. § 40-35-503(b), and does not demonstrate that the Board acted illegally, fraudulently, arbitrarily, or in excess of its jurisdiction. *See Arnold v. Board of Paroles*, 956 S.W.2d 478, 482-83 (Tenn. 1997). Furthermore, the Tennessee Supreme Court has rejected the argument that declining parole based upon seriousness of the offense is an arbitrary decision since the seriousness of the offense

was considered when an inmate was sentenced. *See id.* at 482; *Baldwin v. Tennessee Bd. of Paroles*, 125 S.W.3d 429, 431 (Tenn. Ct. App. 2003).

A petition for writ of certiorari must comply with the requirements in Tenn. Code Ann. §§ 27-8-104(a) & -106 or it must be dismissed. *See Bowling*, 2002 WL 772695, at \*3. While [Petitioner's] petition is notarized on Page 2 and does state the requisite language of Tenn. Code Ann. § 27-8-106, it is not verified. A notarization is merely an acknowledgment of the proper execution of the document, whereas a verification establishes the truth of the document. *See Montague v. State*, E2000-01330-CCA-R3-PC, 2001 WL 1011464, at \*\*1-2 (Tenn. Crim. App. Sept. 4, 2001). Therefore, a notarization is not an acceptable substitute for the verification required by Tenn. Code Ann. §§ 27-8-104(a) & -106. *See id.* While parties who act as their own lawyer are entitled to fair and equal treatment, the Court may not prejudice the substantive rights of adverse parties in order to be fair to *pro se* litigants. *See Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000). "Prisoners and other non-lawyers who represent themselves are not excused from complying with the same applicable substantive and procedural law that represented parties must comply with." *Bowling*, 2002 WL 772695, at \*3 n.6; *see also Hodges v. Tennessee Att'y Gen.*, 43 S.W.3d 918, 920 (Tenn. Ct. App. 2000). Because [Petitioner's] Petition does not contain the requisite verification, his Petition does not comply with Tenn. Code Ann. § 27-8-104(a). . . . (footnotes omitted)

The Trial Court went on to conclude that because the petition did not contain the required verification, the Trial Court did not have subject matter jurisdiction over the petition. As to Petitioner's motion to amend the petition to add the necessary verification, the Trial Court determined that the motion to amend was filed too late and, consequently, did not operate to confer subject matter jurisdiction over the petition.

In addition to finding that it lacked subject matter jurisdiction, the Trial Court also found that the petition was subject to dismissal because Petitioner did not timely file the affidavit required by Tenn. Code Ann. § 41-21-805. Specifically, the original affidavit did not contain a complete list of every lawsuit or claim previously filed by Petitioner, as required by Tenn. Code Ann. 41-21-805(a), *supra* at n.1. Because of this deficiency, Petitioner "failed to comply with Tenn. Code Ann. § 41-21-805, and his Petition must be dismissed. *See Bradfield v. Dukes*, No. W2001-02067-COA-R3-CV, 2002 WL 1760237, at \*3 (Tenn. Ct. App. April 17, 2002)." The Trial Court then pretermitted all remaining issues.

Petitioner appeals claiming only that the Trial Court erred when it dismissed his petition for failure to file an affidavit that complied with all of the requirements of Tenn. Code Ann. § 41-21-805. Petitioner does not raise an issue as to the correctness of the Trial Court's dispositive determination that it lacked subject matter jurisdiction due to the petition not being properly verified in a timely manner.

### **Discussion**

Although Petitioner does not address the issue of whether the Trial Court erred when it concluded that it did not have subject matter jurisdiction, we will, nevertheless, address this issue first because whether or not Petitioner's affidavit complied with Tenn. Code Ann. § 41-21-805 is moot if the Trial Court correctly determined that it lacked subject matter jurisdiction over the petition.

In *Northland Ins. Co. v. State*, 33 S.W.3d 727 (Tenn. 2000), our Supreme Court stated:

A motion to dismiss for lack of subject matter jurisdiction falls under Tennessee Rule of Civil Procedure 12.02(1). The concept of subject matter jurisdiction involves a court's lawful authority to adjudicate a controversy brought before it. *See Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 639 (Tenn. 1996); *Standard Sur. & Casualty Co. v. Sloan*, 180 Tenn. 220, 230, 173 S.W.2d 436, 440 (1943). Subject matter jurisdiction involves the nature of the cause of action and the relief sought, *see Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994), and can only be conferred on a court by constitutional or legislative act. *See Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989). Since a determination of whether subject matter jurisdiction exists is a question of law, our standard of review is de novo, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

*Northland Ins. Co.*, 33 S.W.3d at 729.

In *Wilson v. Tennessee Dep't of Correction*, No. W2005-00910-COA-R3-CV, 2006 WL 325933 (Tenn. Ct. App. Feb.13, 2006), *no appl. perm. appeal filed*, this Court discussed the requirements that a petition for common law writ of certiorari be both verified and notarized. We stated:

In order for a petition for a common law writ of certiorari to be valid, the petitioner must verify the contents of the petition *and* swear to the contents of the petition under oath, typically by utilizing

a notary public. *See* Tenn. Code Ann. §§ 27-8-104(a), -106 (2000); *Underwood*, 2005 Tenn. App. LEXIS 23, at \*7-8, 2005 WL 123501; *Bowling v. Tenn. Bd. of Paroles*, No. M2001-00138-COA-R3-CV, 2002 Tenn. App. LEXIS 291, at \*9, 2002 WL 772695 (Tenn. Ct. App. Apr. 30, 2002). As the Tennessee Court of Criminal Appeals noted, “merely swearing to having knowledge of the allegations contained in the petition is insufficient to qualify as a verification under oath. To conclude otherwise would allow a petitioner to file a petition which knowingly contained frivolous, false, and even perjured allegations or statements of facts.” *Montague*, 2001 Tenn. Crim. App. LEXIS 692, at \*5, 2001 WL 1011464. Subject matter jurisdiction “can only be conferred on a court by constitutional or legislative act.” *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000) (citing *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989)). The Tennessee Constitution and the statutes promulgated by the legislature require that a petition for a writ of common law certiorari be made under oath. *See* Tenn. Const. art. 6, § 10; Tenn. Code Ann. §§ 27-8-104(a), -106 (2000). While Wilson’s petition contained his verification that its contents were true and correct to the best of his knowledge, he failed to have the petition notarized by a notary public. Accordingly, the trial court did not err in dismissing his petition for a lack of subject matter jurisdiction. *Cf.* *Underwood*, 2005 Tenn. App. LEXIS 23, at \*7-8, 2005 WL 123501 (holding that a trial court correctly dismissed a prisoner’s petition for a writ of common law certiorari when the prisoner failed to verify his petition, therefore, the trial court lacked subject matter jurisdiction); *Bowling*, 2002 Tenn. App. LEXIS 291, at \*9, 2002 WL 772695 (ruling that a prisoner’s petition for a writ of common law certiorari was properly dismissed when the prisoner failed to verify the contents of his petition).

*Wilson*, 2006 WL 325933, at \*4 (footnote omitted; emphasis in the original).

The original petition filed by Petitioner did not contain the necessary verification attesting, under oath, to the truth and accuracy of the contents of the petition. Thus, the Trial Court correctly ruled that it lacked subject matter jurisdiction over the petition as originally filed.

The next issue is whether Petitioner timely amended the petition, thereby conferring subject matter jurisdiction on the Trial Court. Petitioner was required to file his petition within sixty (60) days from entry of the order or judgment from which he was appealing. *See* Tenn. Code Ann. § 27-9-102 (2000). The record establishes that the decision to deny Petitioner’s administrative appeal was made on April 3, 2008. Petitioner received notice of the denial of his administrative

appeal on April 7, 2008. Petitioner filed his initial petition on April 29, 2008. Petitioner's motion to amend the petition to add the necessary verification was filed on June 23, 2008, some eighty-one (81) days after the decision was made to deny his administrative appeal, and seventy-seven (77) days after Petitioner learned of that decision. The question then becomes whether the date of filing of the amended petition can relate back to the date the original petition was filed. The answer to that question is "no" and was specifically addressed by this Court in *Blair v. Bd. of Probation and Parole*, 246 S.W.3d 38 (Tenn. Ct. App. 2007) wherein we stated:

Tennessee Code Annotated § 27-9-102 requires that a petition for writ of certiorari be filed within sixty days from the entry of the judgment appealed from. Failure to file the petition within this time limit results in the challenged judgment becoming final, which deprives a reviewing court of jurisdiction over the matter. *See Wheeler v. City of Memphis*, 685 S.W.2d 4, 6 (Tenn. Ct. App. 1984) (citing *Fairhaven Corp. v. Tenn. Health Facilities Comm'n*, 566 S.W.2d 885, 886 (Tenn. Ct. App. 1976)). Jurisdiction of this Court is also predicated upon the verification requirement in section 27-8-106. Neither the trial court nor the appellate court acquires jurisdiction over the petition unless it is verified under this section. *Depew v. King's Inc.*, 197 Tenn. 569, 276 S.W.2d 728, 729 (Tenn. 1955); *Drainage Dist. No. 4 of Madison County v. Askew*, 138 Tenn. 136, 196 S.W. 147, 148 (Tenn. 1917).

A trial court has subject matter jurisdiction to extend the sixty-day time period of section 27-9-102 *if the order granting the extension is entered within the sixty-day period*. After the sixty day period has expired, however, the trial court no longer has such jurisdiction. In other words, "[t]o grant time in which to file [a] petition for certiorari after the expiration of the original term is a power not given to this court." *Crane Enamelware Co. v. Smith*, 168 Tenn. 203, 76 S.W.2d 644, 645 (Tenn. 1934) (quoting *Schlosser Leather Co. v. Gillespie*, 157 Tenn. 166, 6 S.W.2d 328, 328 (Tenn. 1928)). Blair's motion to amend his petition to comply with the verification requirement was filed on June 27, 2006. This was more than sixty days after February 28, 2006, the date on which Blair received notice of the final administrative judgment against him. By that time, the trial court had lost subject matter jurisdiction over Blair's petition and, therefore, was without authority to grant Blair's motion for an extension of time. Consequently, the trial court erred in exercising jurisdiction over Blair's petition, and his petition should have been simply dismissed. *See id.*

*Blair*, 246 S.W.3d at 40, 41 (emphasis added). We reached the same result in *Terry v. Dep't of Correction*, No. W2008-01907-COA-R3-CV, 2009 WL 1138122, at \* 3 (Tenn. Ct. App. April 28, 2009), *no appl. perm. appeal filed* (“Because Mr. Terry failed to file a petition for writ of certiorari that complied with Tennessee Code Annotated sections 27-8-104 and -106 within sixty days, and the trial court did not extend the deadline for filing the petition within the sixty days, the petition was properly dismissed.”).

In light of the foregoing, we conclude that: (1) because Petitioner did not file a properly verified petition within sixty days from the denial of his administrative appeal, and (2) because the Trial Court did not enter an order within that same sixty day period extending the deadline to file the petition, the Trial Court properly determined that it was without subject matter jurisdiction over the petition.

Because we find that the Trial Court lacked subject matter jurisdiction over the petition, the issue of whether the Trial Court properly determined that Petitioner’s affidavit failed to comply with the requirements of Tenn. Code Ann. 41-21-805(a) is pretermitted.

### **Conclusion**

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court solely for the collection of costs below. Costs on appeal are taxed to the Appellant, Jimmy Richardson, and his surety, if any, for which execution may issue, if necessary.

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D. MICHAEL SWINEY, JUDGE